IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 76-218

R. GEORGE SILVOLA,
Petitioner,
vs.
THE PEOPLE OF THE STATE OF COLORADO
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Colorado

BRIEF IN OPPOSITION

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CITATION TO OPINION BELOW

The opinion of the Colorado Supreme Court has not yet been reported in the official Colorado Reports, but has been reported in the advance sheets as *People v. Silvola*, 547 P.2d 1283 (Colo. 1976).

STATEMENT OF THE CASE

Petitioner R. George Silvola, an attorney, was hired in 1969 to help Richard Davis get out of jail, where he was being held for aircraft theft. Although he was in jail when

he first met Silvola, Davis planned to escape and take his stolen airplane radios out of the country (ff. 2580, 2585); because the market price for the goods was higher here in the United States, Silvola talked Davis out of the escape and urged him to "keep working" (ff. 2596, 2597). Davis put up one of his stolen airplanes as collateral on his bond, was released from jail, and immediately got in touch with petitioner: the two were in constant contact for the next several months until Davis' arrest in December, 1969 (ff. 2629, 2630, 2658, 3083), as Davis organized his men and sent them out to steal airplanes and airplane parts; the stolen items would then be advertised and sold nationally, under a variety of aliases. Davis' men were told to contact Silvola if they ever had any trouble with the law (ff. 2491, 3009), and occasionally they would report directly to petitioner on the progress or success of a theft (ff. 1232, 1240, 2892). Silvola and Davis took a trip to Canada and discussed a stolen plane being repainted in Arizona (f. 2634). Silvola helped Davis get a house in which to store the stolen parts brought to him (ff. 2640, 2641, 2663), suggested he use the alias "Martin" (ff. 2643), and together they looked over some stolen radios stored in a trailer (f. 3008). Once, when they suspected someone might be checking on the operation, petitoner suggested they move three stolen planes from the Pikes Peak Airport to avoid detection (f. 2840). At one point, Silvola requested and received from Davis a stolen airplane: Davis explained to petitioner that it had been stolen, and turned it over to him as payment on a debt (f. 2918). They had one major problem hindering their machinations: large amounts of ready cash and fast credit were needed to run the operation (ff. 2667, 3616), but because of the large sums, various banks, and numerous names listed as payee, Davis' bank had to process the checks, thus tying up needed funds for long periods of time. To eliminate this delay and to facilitate the smooth running of the operation, Silvola suggested (ff. 2636, 2669) Davis take all the checks he received from

the sale of the radios stolen by the operation and turn them over to petitioner (ff. 1257, 2792); Silvola collected all of these checks from the sale of the equipment he knew to be stolen (ff. 3567, 3570), ran them through his trust account to launder them for Davis, and gave Davis cash or local checks in return (ff. 2679, 2682, 2804, 2936, 3041, 3042, 3080, 3081, 3146, 3366, 3616). In fact, Davis had no other way to cash the checks and Silvola took care of all the checks that Davis could not otherwise dispose of (ff. 2669, 2670, 2690, 2695, 2696, 2699, 2708, 2712, 2721, 2732, 2733, 2735, 2736, 2738, 2739, 2746, 2748, 2762, 2765, 2768, 2769, 2770, 2780, 2784, 2787 ,2790, 2951). Silvola thus continually provided Davis with the cash and credit the theft operation needed to be run successfully.

Davis was eventually caught again, and implicated Silvola in the scheme. Petitioner was charged with one count of Conspiracy to Commit Theft from November 1968 to February 1970, five counts of Theft-Receiving of airplane parts, radios, and radio equipment in the Fall of 1969, and two counts of Theft of entire aircraft between September and November 1969 (ff 7-15); the last count of stealing an entire airplane was subsequently dismissed on the People's motion (ff. 457-459, 465). Trial commenced on January 8, 1973. Juror James Lyle Brown indicated during voir dire that he might have an opinion as to petitioner's guilt or innocence, and was accordingly challenged for cause (ff. 850-855, 864); the court denied these challenges after it had extensively questioned the juror and satisfied itself that he could render a fair and impartial verdict (ff. 851, 852, 857, 858, 860, 861). Petitioner subsequently removed Mr. Brown from the panel by use of his last peremptory challenge (f. 866). During trial Davis testified against his former attorney. Over petitioner's objection that the testimony violated the attorney-client relationship, three of Silvola's former employees testified briefly on his handling of the Davis

accounts. The jury found Silvola guilty of all seven charges, and petitioner appealed to the Colorado Supreme Court. That court reversed four of the convictions for theft-receiving, as it held the evidence insufficient to establish that the subject aircraft radios were stolen, *People* v. *Silvola*, *supra*, 547 P.2d at 1286 (Colo. 1976); petitioner's convictions for conspiracy, one count of theft-receiving, and one count of theft were affirmed. Petitioner has subsequently sought a Writ of Certiorari from this Court.

SUMMARY OF THE ARGUMENT

Petitioner's complaints were not framed in federal constitutional terms below, and present no federal issues of substance here, and thus his Petition should be denied.

ARGUMENT

I.

THE PEOPLE OF THE STATE OF COLORADO MOVE FOR DISMISSAL OF THIS PETITION FOR LACK OF JURISDICTION UNDER 28 U.S.C. § 1257 BECAUSE ALLEGED FEDERAL CONSTITUTIONAL ERRORS WERE NEVER RAISED OR DECIDED AS SUCH IN THE COLORADO APPELLATE COURTS.

The petition should be dismissed for lack of jurisdiction under 28 U.S.C. § 1257(3) (1970), since petitioner did not raise any federal constitutional questions in his briefs to the Colorado Supreme Court, and that court accordingly decided no federal constitutional questions of substance. *Hill v. California*, 401 U.S. 797, 805 (1971); *Cardinale v. Louisiana*, 394 U.S. 437 (1969); 28 U.S.C. § 1257(3); Sup. Ct. R. 19. *See* also: Sup. Ct. R. 23(1)(f). Petitioner's assertions below, though similar to the questions presented here, were then claimed as errors of state law and not framed as errors of federal constitutional dimensions. See: state brief of appellant.

In *Picard v. Conner*, 404 U.S. 270 (1971), until seeking federal habeas corpus review the petitioner had argued he was improperly indicted under Massachusetts law. *Id.*, at 273. The First Circuit Court of Appeals, in reversing the federal district court's denial of the habeas corpus claim, found an equal protection argument inherent in petitioner's claim. Id., at 277. However, this Court reversed, holding that, "[T]he federal claim must be fairly presented to the state courts. . . . The claim that an indictment is invalid is not the substantial equivalent of a claim that it results in an unconstitutional discrimination." *Id.*, at 275, 278. As in *Picard*, *supra*, all of petitioner's claims have previously been framed only in terms of violation of state law, and accordingly are not properly before this Court on Petition for Certiorari. Although *Picard* was a habeas corpus case brought under 28 U.S.C. § 2254 (1970), the interests of federalism—that federal constitutional questions in state criminal cases must first be decided in such a framework by the state courts—are similar in cases of direct review by way of Certiorari under 28 U.S.C. § 1257(3) (1970). *Hill v. California*, 401 U.S. at 805; *Cardinale v. Louisiana*, 394 U.S. at 439. This Court should therefore dismiss this petition for lack of jurisdiction for petitioner's failure properly to present the alleged federal constitutional questions first to the Colorado courts.

II.

NO FEDERAL CONSTITUTIONAL QUESTIONS OF SUBSTANCE ARE RAISED BY PETITIONER'S ARGUMENT THAT THE SUBMISSION TO THE JURY OF SEVEN COUNTS, CONVICTIONS ON FOUR OF WHICH WERE ULTIMATELY REVERSED, SOMEHOW TAINTED THE JURY'S DELIBERATION ON THE REMAINING THREE COUNTS AND THAT THE JURY SPENT INSUFFICIENT TIME IN ITS DELIBERATIONS.

Petitioner was convicted initially of seven counts of theft-receiving, theft, and conspiracy; the Colorado Supreme Court reversed four of these theft-receiving convictions for insufficint evidence. Petitioner claims that the submission of all seven counts to the jury initially somehow "tainted" the jury's deliberation because four convictions were ultimately reversed. Petitioner also intimates that less than three hours is insufficient time for a jury fairly to reach a verdict.

Petitioner's failure to cite authority on this issue is evidence of the novelty of his claim, making it uniquely unsuitable for consideration by this Court. Sup. Ct. R. 19. *See*: *State v. Killary*, 113 Vt. 604, 349 A.2d 216 (1975), where the Vermont Supreme Court could find no instance in which the shortness of a jury's deliberation in a criminal case was reversible error. *See* also: *United States v. Brotherton*, 427 F.2d 1286, 1289 (8th Cir. 1970), wherein five to seven minutes was held to be ample time to resolve whether or not the circumstances of the case warranted a finding that defendant knew the motor vehicle was stolen. *See also*: *United States v. Isaacs*, 364 F. Supp. 895 (N.D. Ill. 1973), affirmed 493 F.2d 1124 (7th Cir. 1974), cert. denied sub nom., *Kerner v. United States*, 417 U.S. 976 (1974).

III.

PETITIONER'S CLAIM THAT THE STATE TRIAL COURT FAILED TO INSTRUCT ON HIS ALLEGED THEORY OF THE CASE RAISES NO FEDERAL CONSTITUTIONAL QUESTIONS OF SUBSTANCE, AND IS UNSUPPORTED BY COMMON LAW AS THE PROPOSED INSTRUCTION WAS IRRELEVANT AND WITHOUT A LEGAL BASIS.

Petitioner somewhat incredibly claims that the Colorado trial court committed error of constitutional magnitude by refusing to instruct that a check made out to a fictitious payee may in some cases be "a valid instrument and subject to transfer" under Article 3 of the Uniform Commercial Code.

Defendant again raises no federal constitutional claim. Both the Colorado and the federal courts recognize a criminal defendant is entitled to instructions relating to a theory of defense, if that theory is supported by law and has some foundation in the evidence. *United State v. Garner*, 529 F.2d 962 (6th Cir. 1976); *United States v. Swinton*, 521 F.2d 1255 (10th Cir. 1975). *See*: Fed. R. Crim. P. 30; Colo. R. Crim. P. 30. However "elementary" this rule may be, *see*, *Perez v. United States*, 297 F.2d 12 (5th Cir. 1961), it is nevertheless based on common law and state and federal rules of criminal procedure. *See*: *United States v. Nance*, 502 F.2d 615 (8th Cir. 1974), cert. denied 420 U.S. 926 (1975). These rules "[A]re not constitutional imperatives. . . . They are procedural only." *United States ex rel. Gaughler v. Brierley*, 477 F.2d 516, 523 (3rd Cir. 1973). Accordingly, violation of such a rule presents no federal constitutional question.

There is no reason for this Court to entertain this issue. There is no federal constitutonal issue, or even dis-

agreement over the applicable state law, but rather only a dispute over a state judge's application of state law to the facts of petitioner's case in a state court. Furthermore, petitioner's state law claim is frivolous. Whether or not a check is negotiable or transferable is irrevelant to the question of whether an accused "[O]btains control over any stolen thing of value knowing the thing of value to have been stolen by another . . . " Colo. Rev. Stat. Ann. 40-5-2(1) (b) (iv) (Perm. Supp. 1967). *See*: Colo. Rev. Stat. Ann. 155-3-405(2) (1963). Accordingly the tendered instruction did not constitute a defense, was not an exculpatory "theory of the case," and was properly denied.

IV.

PETITIONER'S CLAIM THAT THE COLORADO SUPREME COURT MISAPPLIED COLORADO CASE LAW IN DETERMINING WHETHER PREJUDICIAL ERROR OCCURRED IN THE DENIAL OF A CHALLENGE OF A POTENTIAL JUROR FOR CAUSE RAISES NO FEDERAL CONSTITUTIONAL QUESTION.

Petitioner disputes the holding of the Colorado Supreme Court that, under the rule of *Skeels v. People*, 145 Colo. 281, 358 P.2d 605 (1961), a defendant must allege or show that he was actually deprived of the opportunity to challenge peremptorily other undesirable members of the venire; he asserts that the mere exhaustion of his peremptory challenge is in and of itself a sufficient showing of prejudice. Whatever the merits of the petitioner's argument under the law of Colorado, it has no federal constitutional significance, as is apparent from petitioner's inability to cite any constitutional authority for his clam. Defendant has also failed to express to this Court any reasons why this Court should interfere with the Colorado court's determination of this issue of state procedure.

V.

PETITIONER'S CLAIM THAT THE COLORADO COURTS DENIED HIS DUE PROCESS RIGHTS BY ALLEGEDLY MISINTERPRETING THE COLORADO STATUTE ON THE ATTORNEY-CLIENT PRIVILEGE RAISES NO FEDERAL QUESTION.

The question of attorney-client privilege is peculiarly nonconstitutional and therefore presents no federal questions to this Court: *See e.g. In Re Grand Jury Proceedings*, 517 F.2d 666 (5th Cir. 1975); Fed. R. Evid. 501 and accompanying Historical Note.

VI.

PETITIONER'S CLAIM, THAT THE FAILURE OF THE PROSECUTION TO ALLEGE ALL ELEMENTS OF THE OFFENSE CHARGED IN THE INDICTMENT DENIED HIM DUE PROCESS, RAISES NO FEDERAL CONSTITUTIONAL ISSUES OF SUBSTANCE.

The question of whether a state criminal indictment must allege all elements of a crime, including the element of intent, is a matter of state law but not federal constitutional law. Cf.: *Illinois v. Somerville*, 410 U.S. 458, 459 (1973) (in determining "manifest necessity" requirement of Double Jeopardy Clause the Court looked to state law on the significance of the indictment)and the dissent of Justice Marshall, *id.*, at 479-480; *Russell v. United States*, 369 U.S. 749, 761-762 (1962). Significantly, petitioner can marshal no federal cases to support his claim. While he cites cases from many state courts, he conveniently ignores the governing Colorado case of *People v. Ingersoll*, 181 Colo. 1, 3, 506 P.2d 364, 365 (1973), which held that every element of a crime need not be charged in an information,

although the jury of course must subsequently be instructed as to the elements of the crime and the prosecutor must prove all the elements at trial. The holding of *People v. Ingersoll* was reaffirmed by the Colorado Supreme Court in this case.

CONCLUSION

Since he failed to present his alleged federal constitutional claims to the Colorado courts in the first instance, petitioner cannot invoke the jurisdiction of this Court under 28 U.S.C. § 1257(3). None of the claims involved federal questions of substance as required by 28 U.S.C. § 1257(3) and Sup. Ct. R. 19, nor has petitioner stated any special or important reasons why this Court should review this case. The People of the State of Colorado therefore pray that the Petition for Writ of Certiorari be DENIED.

Respectfully submitted,

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